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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 01 2007
WAC 04 142 52004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Other Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

CC: [redacted]

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

It is noted that the G-28 in the record of proceeding is not signed by the petitioner, but by the beneficiary. The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) states:

> *Meaning of affected party.* For purposes of this section and §§ 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(i) further provides in relevant part:

> *Appeal by attorney or representative without proper Form G-28-(i) General.* If an appeal is filed by an attorney or representative without a properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) entitling that person to file the appeal, the appeal is considered improperly filed. In such a case, any filing fee the Service has accepted will not be refunded regardless of the action taken.

As the person (counsel representing the beneficiary) filing the appeal is not an affected party, the appeal is considered to be improperly filed. However, in the interest of fairness and since the director recognized counsel, the AAO will review counsel's arguments and evidence submissions and provide a copy of the decision to her.

The petitioner is a Persian restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 23, 2005 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The

> petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is $10.00 per hour or $20,800 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. Relevant evidence submitted on appeal includes counsel's brief, a copy of the petitioner's second quarter 2005 Form DE-6, Quarterly Wage Reports, and a copy of a payroll journal for the beneficiary as of June 27, 2005. Other relevant evidence includes copies of the petitioner's 2001 through 2003 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss From Business, copies of the petitioner's January, February, and March 2005 personal expenses, copies of the petitioner's 2004 Forms DE-6, and copies of the beneficiary's 2002 through 2004 Forms W-2, Wage and Tax Statements. The record does not contain any other evidence relevant to the petitioners' ability to pay the proffered wage.

The petitioner's 2001 through 2003 Forms 1040 reflect adjusted gross incomes of $5,754, $6,706, and $6,518, respectively, and the Schedule C's reflect net profits of $6,192, $7,216, and $7,014, respectively.

The beneficiary's 2002 through 2004 Forms W-2 reflect wages paid to the beneficiary by the petitioner of $1,215, $7,020, and $9,510, respectively.

The petitioner's monthly personal expenses for January, February, and March 2005 reflect expenses of $1,730, $1,658, and $1,628, respectively.

The petitioner's 2004 Forms DE-6 reflect wages paid to the beneficiary of $9,510 in 2004, and the petitioner's Form DE-6 for the second quarter of 2005 reflects wages paid to the beneficiary of $4,675 in that quarter, while the payroll journal as of June 27, 2005 reflects year to date wages paid to the beneficiary of $7,675.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of $20,800 based on the fact that it is a bona fide company, that the petitioner has been in business for ten years, and that its restaurant equipment, inventory, and tools are worth much more than the proffered wage of $20,800.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary claimed to have been employed by the petitioner from February 1999 to the present. Counsel submitted the beneficiary's 2002 through 2004 Forms W-2 as confirmation of the beneficiary's employment by the petitioner. The petitioner paid the beneficiary $1,215, $7,020, and $9,510, respectively, in 2002 through 2004. Therefore, the petitioner has established that it employed the beneficiary in 2002 through 2004. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of $20,800 and the actual wages paid to the beneficiary. In the instant case, the petitioner paid the beneficiary $19,585 less than the proffered wage of $20,800 in 2002, $13,780 less than the proffered wage of $20,800 in 2003, and $11,290 less than the proffered wage of $20,800 in 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of

slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported a family of two. The petitioner's 2001 through 2003 tax returns reflect adjusted gross incomes of $5,754, $6,706, and $6,518, respectively. None of the tax returns reflect adjusted gross incomes sufficient enough to pay the difference between the proffered wage of $20,800 and the actual wages paid to the beneficiary in those years. As stated above, that difference would have been $19,585 in 2002 and $13,780 in 2003. The tax return for 2004 was not provided; therefore, the AAO is unable to determine if the petitioner could have paid the difference of $11,290 in 2004. Likewise, the 2001 Form W-2, issued by the petitioner for the beneficiary, was not provided; and, therefore, the AAO is unable to ascertain if the petitioner had sufficient funds to pay the difference between the proffered wage of $20,800 and the actual wages paid to the beneficiary in 2001.[2]

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage based on the fact that it is a bona fide company, that the petitioner has been in business for ten years, and that its restaurant equipment, inventory, and tools are worth much more than the proffered wage of $20,800.

Counsel is mistaken. The mere fact that the petitioner is doing business does not imply that it is a viable entity. In the instant case, the petitioner appears to have barely survived. Its gross receipts began at $69,557 in 2001, decreased to $50,254 in 2002, and only increased to $63,670 in 2003. In addition, the petitioner's net profit began as $6,192 in 2001, to $7,216 in 2002, and down to $7,014. There is nothing in these numbers that would convince the AAO that the petitioner could successfully pay the beneficiary a wage ranging from a low of approximately 30% of the gross receipts in 2001 to a high of approximately 41.4% of the gross receipts in 2002 and support a family of two in the pertinent years.[3] *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

With regard to counsel's statement that the restaurant's equipment, inventory, and tools are worth much more than the proffered wage of $20,800 and that they should be considered when determining the petitioner's ability to pay the proffered wage, CIS considers equipment and tools to be long-term assets (having a life longer than one year) and are not considered to be readily available to pay the proffered wage to the beneficiary. While inventory can usually be considered when determining the petitioner's ability to pay the proffered wage, in this case, the AAO cannot imagine how the petitioner could sell its inventory to pay the proffered wage to the beneficiary and still continue to operate as a business.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the

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[2] It should be noted that the petitioner is not only obligated to pay the difference between the proffered wage of $20,800 and the actual wages paid to the beneficiary, but also must show that it had sufficient funds to support his family of two in the pertinent years (i.e., monthly expenses).

[3] The petitioner has not submitted any additional evidence of the owner's assets such as personal bank account statements, CDs, money market funds, etc. to show that it had additional funds with which to pay the proffered wage.

employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has provided tax returns for the years 2001 through 2003, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In fact, all three tax returns show adjusted gross incomes below the proffered wage of $20,800. There is also no evidence of the petitioner's reputation throughout the industry. Furthermore, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 through 2003 were uncharacteristically unprofitable years for the petitioner.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal does not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.